JUNHE BULLETIN

March 7, 2023

Financial

Formal Promulgation of the Measures for Private Fund Manager Registration and Private Fund Filing: Key Takeaways for Foreign-Invested PFMs

After considering comments received from public consultation, the Asset Management Association of China ("AMAC") formally issued the *Measures for Private Fund Manager Registration and Private Fund Filing* (the "Measures") and the ancillary guidelines on February 24, 2023. We have summarized and highlighted below some of the key points for foreign-invested private fund managers in respect of private fund manager ("PFM") registration and private fund filing.

I. Foreign-invested PFM Registration

The Measures and the ancillary guidelines further optimize the PFM registration regime, improve the rules and standards for PFM registration, and provide requirements on key aspects of PFMs such as "personnel", "capital", and "facilities".

1. Direct or Indirect Shareholders

1.1 The overseas shareholder of a wholly-foreign-owned securities-type PFM (usually referred to as "WFOE PFM") shall be a financial institution approved or licensed by the financial regulator of the country or region where it is located, and the securities regulatory authority in the country or region where it is located has entered into a memorandum of understanding on securities regulatory cooperation with the China Securities Regulatory Commission ("CSRC") or any other organizations recognized by the CSRC. Such provisions are consistent with the earlier rules issued by the AMAC, i.e., *No.10 Q&As on Relevant Issues on Private Fund Manager Registration and Private Fund Filing* and the *Filing Instructions to Private Fund Manager Registration and Private Fund Filing of Wholly Foreign-owned and Joint Venture Private Securities Investment Fund Managers*.

1.2 By contrast, relevant provisions do not require the direct or indirect shareholder of a foreign-invested equity-type PFM (usually referred to as "WFOE PEFM", WFOE PFM and WFOE PEFM collectively referred to as "foreign-invested PFM") to be an institution approved or licensed by the financial regulator of the country or region where it is located.

It is worth noting that Article 8 of the Measures provides that a PFM's legal representative, executive partner or its appointed representative, and senior management personnel in charge of investment management shall collectively hold a certain proportion of equity interest or property shares of the PFM directly or indirectly, but PFMs controlled by institutions regulated by overseas financial regulators, among others, can be exempted. Since most foreign-invested equity-type PFMs (WOFE PEFM) and QDLP fund managers are directly or indirectly controlled by institutions regulated by overseas financial regulators, they can be exempt from the above compulsory employee shareholding requirement.

2. Determination of the De Facto Controller

According to the Measures and Article 11 of the *Guidelines No. 2 for the Registration of Private Fund Managers: Shareholders, Partners and De Facto Controllers*, a de facto controller refers to a natural person, legal person or any other organization that can direct the operation of a PFM through investments, agreements, or other arrangements. The de facto controller of a PFM shall be traced up to a natural person, state-owned enterprise, listed company, financial institution approved by the financial administration departments, public institution such as a university or research institute, social organization with a nature of the legal person, or an institution regulated by overseas financial regulators, and shall be determined based on the following criteria in sequence: (1) holding 50% or more equity interests; (2) exercising a majority of shareholders' voting rights by virtue of an acting-in-concert agreement; (3) by exercising voting rights, being able to appoint half or more members of the board of directors or being able to appoint the executive director.

Pursuant to the Measures, the de facto controller of a WFOE PFM shall be an overseas financial institution, which is consistent with the current rules that the de facto controller of a WFOE PFM must be traced up to the overseas financial institution approved or licensed by overseas financial regulators.

While for a foreign-invested equity-type PFM (WFOE PEFM) or an other-type PFM such as QDLP fund manager, if the de facto controller is a natural person, they shall have at least 5 years' relevant experience in operation and management, or in asset management, investment, or related industries. Furthermore, unless otherwise provided, they shall take the position of a director, supervisor, senior officer, or executive partner or its appointed representative in the PFM under their control.

The Measures provide more detailed rules on PFMs within the same group. If the same controlling shareholder or de facto controller controls two or more PFMs, the following requirements must be satisfied:

(1) Having sufficient reason and necessity; the PFMs under its control shall carry out businesses continuously and in a compliant and effective manner;

(2) Making reasonable and effective arrangements for internal control regimes such as business risk isolation, avoidance of horizontal competition, management of related-party transactions, and prevention of conflicts of interest;

(3) Establishing an ongoing compliance and risk management regime that matches the management scale and business

operation status of the PFMs under its control.

We understand that the above provisions apply to foreign managers wishing to carry out private securities fund management business, private equity fund management business and QDLP fund management business concurrently within the territory of China.

3. Qualifications for Senior Management Personnel

The Measures set out higher requirements on PFMs' legal representatives and senior management personnel in charge of investment management in terms of work experience.

Specifically, a securities-type PFM's legal representative, executive partner or its appointed representative, person in charge of operations and management, and senior management personnel in charge of investment management shall have at least five years' work experience in securities, funds, futures investment management or other related work experience.

An equity-type PFM's legal representative, executive partner or its appointed representative, person in charge of operations and management, and senior management personnel in charge of investment management shall have at least five years' work experience in equity investment management or related industry management.

The requirements for persons in charge of compliance and risk control remain unchanged, that is, at least three years' work experience in legal, accounting, auditing, supervision, and inspection relating to investments, or in compliance, risk control, regulation and self-disciplinary management in the asset management industry.

The Measures and the *Guidelines No. 3 for Registration of Private Fund Managers: Legal Representatives, Senior Management Personnel and Executive Partners and Appointed Representatives* (the "Guidelines No. 3") clarify specific requirements of the investment management's track record on PFMs' senior management personnel in charge of investment management. A securities-type PFM's senior management personnel in charge of investment management shall have more than two consecutive years' investment track record within the last ten years, and the management scale of a single product or a single account shall be at least RMB 20 million. An equity-type PFM's senior management personnel in charge of investment management shall have experience in leading at least two investments in the equities of non-listed enterprises within the last ten years, with a total investment amount of not less than RMB 30 million, and at least one of which shall have exited through an initial public offering, equity-related merger and acquisition, or equity transfer, or they shall have other investment management track record that meets relevant requirements. These requirements set a higher threshold for the experience of senior management personnel in charge of investment management, which means in any case foreign managers would have to spend longer time and higher cost than their local peers to recruit local staff to build up their own senior management and investment teams.

The Measures and Guidelines No. 3 exclude some unqualified persons from being a PFM's senior officer and clarify the specific criteria of securities/equity-related work experience, and foreign managers are advised to proceed

with care when recruiting their local teams. In addition, although after the resignation of a senior officer, a PFM may appoint a qualified person to perform their duties temporarily, managers should note that they must employ a qualified senior officer within six months.

4. **Minimum Number of Staff and Dual-Hatting Restrictions**

The Measures provide that a PFM shall have at least five full-time employees. The *Guidelines No. 1 for the Registration of Private Fund Managers: Basic Operational Requirements* (the "Guidelines No. 1") clarify that full-time employees includes not only those employees who have signed labor contracts with a PFM and the PFM pays social security for them, but also foreign employees who have signed labor contracts or service contracts with the PFM, which is good news for foreign-invested PFMs. The Measures are generally consistent with the earlier rules in terms of the dual-hatting restrictions and provide that it must be justifiable if PFM's senior management personnel take any concurrent positions and they shall not concurrently hold a position in an institution with a conflict of interest, such as a non-affiliated PFM, or an institution whose business has a conflict of interest, and the person-in-charge of compliance and risk control, in particular, shall not concurrently hold a position in any other profit-making institution. We note that the Measures and the ancillary guidelines no longer have the current restriction that the number of dual-hatted senior management personnel shall not exceed 50% of the total number of senior management personnel.

Notably, the Measures and the Guidelines No. 3 provide exceptions on the minimum number of full-time employees and dual-hatting restrictions on senior management personnel, that is, if there are provisions on PFMs otherwise provided in Article 17 (i.e., PFMs within the same group) of the Measures, such provisions shall prevail. We understand these exceptions leave room for senior management personnel in WFOE PFMs to hold a post concurrently in their QDLP subsidiaries.

5. **Requirements on Paid-in Capital**

The Measures, being consistent with the consultation paper, specify the minimum paid-in capital of a PFM, i.e., a PFM's paid-in monetary capital shall not be less than RMB 10 million or its equivalent.

6. **Requirements on Business Premises**

According to the Measures and Article 8 of the Guidelines No. 1, PFMs shall have an independent and stable business premise, and shall not use shared office space or other premises of insufficient stability as the business premise, nor shall PFMs share offices with their shareholders, partners, de facto controllers, or affiliates. If the PFM rents a business premise, the remaining lease term shall not be less than 12 months starting from the date of submitting the application for PFM registration, unless there are reasonable grounds. Though it is not unusual in practice that a PFM's registered office is inconsistent with its business premises, the PFM must justify such arrangements and state the reasons to the AMAC.

II. Private Fund Filing

The Measures for the first time set out requirements on the minimum initial paid-up capital of private funds, that is, it shall be not less than RMB 10 million for a securities-type private fund or a PE/VC-type private fund, and RMB 20 million for a private fund that invests in a single target. In practice, most QDLP funds are feeder funds that will invest in a single overseas target,

i.e., an offshore fund managed by the QDLP fund manager's overseas shareholders or its affiliates. QDLP funds under this structure would possibly be considered as private funds investing in a single target and therefore subject to the RMB 20 million minimum requirement. It is important to note that the AMAC may consider local QDLP pilot rules on the minimum subscribed capital/initial fundraising amount of QDLP funds, for example, the local QDLP pilot rules may provide that the minimum subscribed capital/initial fundraising amount of a QDLP fund shall be not less than RMB 30 million or its equivalent.

In the consultation paper of the Measures, Article 44 once expressly enumerated specific circumstances where the AMAC may take prudent measures to handle private funds filing. We noted that these specific circumstances are no longer specified in the Measures to leave certain flexibility in the application of Article 44. If a PFM involves major potential risks, a private fund involves major matters without precedent, or the fund structure is complex or the investment targets are special, the AMAC may impose additional requirements on the relevant private funds to be filed, including imposing higher requirements on investors, raising requirements for the fund size, requiring mandatory custody of the fund assets and requiring the custodian to issue a due diligence report or to cooperate with inquiries. It could also include enhanced information disclosure requirements, disclosing special risk factors, implementing quota administration, restricting related-party transactions, and a requirement to issue an internal compliance opinion, submit a legal opinion or submit relevant financial reports.

III. Grace Period

The Measures and the ancillary guidelines will take effect from May 1, 2023. Current rules will apply to applications for PFM registration, fund filing, and the change of information submitted before the implementation of the Measures. While for those have been submitted before the implementation of the Measures but not yet completed as of May 1, 2023, as well as those to be submitted after the implementation of the Measures, the Measures and the ancillary guidelines will apply.

IV. Our Observations

The Measures and the ancillary guidelines improve the current self-disciplinary regimes of PFM registration and private fund filing and lay a foundation for the subsequent implementation rules. We expect the AMAC may update the checklists for PFM registration and private fund filing as well as other ancillary rules according to the Measures and the ancillary guidelines. We will continue to monitor the latest practice and feedback in the market upon the implementation of these new rules and keep our clients apprised of the latest developments.

Natasha XIE	Partner	Tel：86 21 2208 6238	Email：xieq@junhe.com
Austin ZHANG	Partner	Tel：86 21 2208 6177	Email：zhangchi_Austin@junhe.com
Danchen LUO	Associate	Tel：86 21 2283 8320	Email：luodch@junhe.com
Joyce ZHANG	Associate	Tel：86 21 2283 8271	Email：zhangl_Joyce@junhe.com

君合研究简讯

JUNHE

2023 年 3 月 7 日

金融法律热点问题

《私募投资基金登记备案办法》正式出台 – 外资私募基金管理人须知的若干事项

中国证券投资基金业协会(“基金业协会”)经过公开征求意见并采纳市场各方反馈的意见建议后于 2023 年 2 月 24 日正式发布《私募投资基金登记备案办法》(以下简称“《办法》”)及配套指引。以下我们简要提示《办法》及配套指引中有关外资私募基金管理人登记及基金备案需要注意的若干事项。

一、外资私募基金管理人登记

《办法》及配套指引进一步优化了私募基金管理人登记体系，完善了登记规范标准，并对私募基金管理人的“人”、“财”和“物”等方面作出了规范。

1. 直接或间接股东

1.1 外资私募证券基金管理人的境外股东应为所在国家或者地区金融监管部门批准或者许可的金融机构，且所在国家或者地区的证券监管机构已与中国证监会或者中国证监会认可的其他机构签订证券监管合作谅解备忘录。上述要求与基金业协会之前发布的《私募基金登记备案相关问题解答(十)》和《外商独资和合资私募证券投资基金管理人登记备案填报说明》等规定一致。

1.2 对于外资私募股权基金管理人，相关规定并未强制要求外资私募股权基金管理人的直接或间接股东为境外金融监管部门批准或者许可的机构。

值得注意的是，《办法》第八条规定私募基金管理人的法定代表人、执行事务合伙人或其委派代表、负责投资管理的高级管理人员需要直接或者间接合计持有私募基金管理人一定比例的股权或者财产份额，但受境外金融监管部门监管的机构控制的私募基金管理人不适用前述规定。对于绝大多数外资私募股权基金管理人或 QDLP 管理人而言，由于其直接或间接控股股东是受境外金融监管部门监管的机构，因此可以豁免适用前述规定。

2. 实际控制人的认定

根据《办法》和《私募基金管理人登记指引第 2 号——股东、合伙人、实际控制人》第十一条的规定，实际控制人是指通过投资关系、协议或者其他安排，能够实际支配私募基金管理人运营的自然人、法人或者其他组织。实际控制人应当追溯至自然人、国有企业、上市公司、金融管理部门批准设立的金融机构、大学及研究院所等事业单位、社会团体法人、受境外金融监管部门监管的机构等，并

应当通过下列路径依次认定实际控制人：(1)持股50%以上的；(2)通过一致行动协议实际行使半数以上股东表决权的；(3)通过行使表决权能够决定董事会半数以上成员当选的或者能够决定执行董事当选的。

《办法》规定外资私募证券基金管理人的实际控制人应当是境外金融持牌机构，与现行规定要求认定外资私募证券基金管理人实际控制人应追溯到最上层由境外金融监管部门批准或许可的境外金融机构相一致。

对于外资私募股权基金管理人或其他类私募基金管理人，如其实际控制人为自然人的，该自然人应有经营、管理或者从事资产管理、投资、相关产业等相关经验，且相关经验满 5 年。此外，除非另有规定，该自然人还应当在其实际控制的私募基金管理人中担任董事、监事、高级管理人员，或者执行事务合伙人或其委派代表。

《办法》还对集团化运作做了更明确的规定。同一控股股东、实际控制人控制两家以上私募基金管理人的，应当：

(1) 具备充分的合理性与必要性，其控制的私募基金管理人应当持续、合规、有效展业；

(2) 就业务风险隔离、避免同业化竞争、关联交易管理和防范利益冲突等内控制度作出合理有效安排；

(3) 建立与所控制的私募基金管理人的管理规模、业务情况相适应的持续合规和风险管理体系。

上述规定也适用拟在中国境内同时开展私募证券、私募股权和 QDLP 业务的外资机构。

3. 高级管理人员资格要求

《办法》对于私募基金管理人的法定代表人和负责投资管理的高级管理人员设置了更高的经验门槛。其中，私募证券基金管理人的法定代表人、执行事务合伙人或其委派代表、经营管理主要负责人以及负责投资管理的高级管理人员应当具有 5 年以上证券、基金、期货投资管理等相关工作经验；私募股权基金管理人的法定代表人、执行事务合伙人或其委派代表、经营管理主要负责人以及负责投资管理的高级管理人员应当具有 5 年以上股权投资管理或者相关产业管理等工作经验。合规负责人的工作经验要求仍为具有 3 年以上投资相关的法律、会计、审计、监察、稽核，或者资产管理行业合规、风控、监管和自律管理等相关工作经验。

《办法》和《私募基金管理人登记指引第 3 号——法定代表人、高级管理人员、执行事务合伙人及其委派代表》(“《登记指引 3 号》”)对私募基金管理人中负责投资管理的高级管理人员的投资管理业绩做了明确规定。其中，私募证券基金管理人负责投资管理的高级管理人员的投资管理业绩应当为最近 10 年内连续 2 年以上的投资业绩，单只产品或者单个账户的管理规模不低于 2000 万元人民币。私募股权基金管理人负责投资管理的高级管理人员的投资管理业绩，是指最近 10 年内至少 2 起主导投资于未上市企业股权的项目经验，投资金额合计不低于 3000 万元人民币，且至少应有 1 起项目通过首次公开发行股票并上市、股权并购或者股权转让等方式退出，或者其他符合要求的投资管理业绩。前述规定对于负责投资管理的高管人员的业绩设置了更高的门槛和要求，对于主要依赖本土招聘高管团队的外资私募基金管理人而言，建立本土高管和投资团队始终意味着需要花费较长时间和较高成本。

《办法》和《登记指引 3 号》还分别列举了不得担任私募基金管理人的高级管理人员的情形和高管人员符合证券/股权相关工作经验的具体标准，外资私募基金管理人在招募本土团队时需要予以注意。此外，外资机构还需要注意，如高管人员离职的，可以由符合任职要求的人员代为履职，但私募基金管理人应在 6 个月内聘任符合岗位要求的高级管理人员。

4. 员工人数和兼职要求

《办法》规定私募基金管理人专职员工不少于 5 人。《私募基金管理人登记指引第 1 号——基本经营要求》(“《登记指引 1 号》”)进一步规定专职员工不但包括与私募基金管理人签订劳动合同并缴纳社保的正式员工，还包括签订劳动合同或者劳务

合同的外籍员工，这对外资私募基金管理人而言是利好消息。对于私募基金管理人的高管人员的兼职问题，《办法》的规定基本与现行规定一致，即高管人员兼职应当具有合理性，不得在非关联私募基金管理人、冲突业务机构等与所在机构存在利益冲突的机构兼职，且合规风控负责人不得在其他营利性机构兼职。我们也注意到，现行规定的兼职高管人员数量应不高于申请机构全部高管人员数量的二分之一并未写入本次的《办法》及配套指引。

此外，《办法》和《登记指引 3 号》对专职人数和高管人员兼职规定了但书条款，即《办法》第十七条(集团化运作)规定的私募基金管理人另有规定的，从其规定。我们理解该条款为母子结构下外资私募证券基金管理人与 QDLP 基金管理人的人员兼职留出了空间。

5. 实缴资本的要求

与征求意见稿一致，《办法》明确了私募基金管理人最低实缴资本金额，即私募基金管理人的实缴货币资本应不低于 1000 万元人民币或者等值可自由兑换货币。

6. 办公场地的要求

《办法》以及《登记指引 1 号》第八条的规定，私募基金管理人应当具有独立、稳定的经营场所，不得使用共享空间等稳定性不足的场地作为经营场所，不得存在与其股东、合伙人、实际控制人、关联方等混同办公的情形。经营场所系租赁所得的，自提请办理登记之日起，剩余租赁期应当不少于 12 个月，但有合理理由的除外。此外，尽管实践中私募基金管理人注册地与经营地分离并不罕见，该等安排需要具有合理性且管理人需向基金业协会说明理由。

二、私募基金备案

《办法》首次对私募基金初始实缴募集资金规模做出了规定，其中私募证券基金不低于 1000 万元人民币；私募股权基金不低于 1000 万元人民币；投向单一标的的私募基金不低于 2000 万元人民币。目前，QDLP 基金多作为联接基金投到境外唯一标的，即境外股东或关联方管理的境外基金产品，该等架构有可能被认为是投向单一标的的私募基金，从而受限于 2000 万元人民币的最低初始实缴募资规模要求。此外，基金业协会目前在审核 QDLP 基金备案时，也可能会参照各地 QDLP 试点办法中对于 QDLP 认缴出资金额/初始募资规模的最低要求执行，例如不低于 3000 万元人民币或等值外币。

《办法》的征求意见稿第四十四条列举了基金业协会可以审慎备案私募基金的具体情形。《办法》正式稿删除了这些列举的具体情形，保留了一定的灵活性。基金业协会可以在私募基金管理人存在较大风险隐患，私募基金涉及重大无先例事项，或者存在结构复杂、投资标的类型特殊等情形时，按照规定对私募基金管理人拟备案的私募基金采取提高投资者要求、提高基金规模要求、要求基金托管、要求托管人出具尽职调查报告或者配合询问、加强信息披露、提示特别风险、额度管理、限制关联交易，以及要求其出具内部合规意见、提交法律意见书或者相关财务报告等措施。

三、过渡期安排

《办法》及配套指引将于 2023 年 5 月 1 日起施行。对于《办法》施行前已提交办理的登记、备案和信息变更等业务，按照现行规则办理。自 2023 年 5 月 1 日起，《办法》施行前已提交但尚未完成办理的登记、备案及信息变更事项，按照《办法》办理；而施行后提交办理的登记、备案和信息变更业务，按照《办法》办理。

四、我们的观察

《办法》及配套指引对现行私募基金登记备案的自律监管体系进行了升级，也为后续配套规则的制定打下了基础。我们预期基金业协会将会根据新规发布新的管理人登记和私募基金备案申请材料清单及其他配套规则。我们将持续关注新规正式施行后实践情况和市场反馈，并及时与我们的客户分享最新进展。

谢　青　合伙人　电话：86 21 2208 6238　　邮箱地址：xieq@junhe.com
张　弛　合伙人　电话：86 21 2208 6177　　邮箱地址：zhangchi_Austin@junhe.com
罗丹晨　律　师　电话：86 21 2283 8320　　邮箱地址：luodch@junhe.com
张　琳　律　师　电话：86 21 2283 8271　　邮箱地址：zhangl_Joyce@junhe.com